

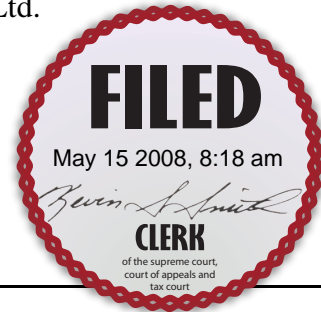
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**IN THE
COURT OF APPEALS OF INDIANA**

MICHELLE RAU and EDWARD RAU, jointly)
and severally, and LYNN RAU and ROBERT)
RAU, jointly and severally,)

Appellants-Plaintiffs,)

vs.)

HOMEOWNERS OF MALLARDS)
LANDING, INC.,)

Appellee-Defendant.)

No. 64A03-0706-CV-276

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0105-CT-4031

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellants-Plaintiffs, Michelle Rau, Edward Rau, Lynn Rau, and Robert Rau (collectively, the Raus), appeal the trial court's entry of summary judgment in favor of Homeowners of Mallards Landing, Inc. (HOML) and denial of their Motion to Correct Errors in their action against HOML for failure to enforce restrictive covenants.

We affirm.

ISSUES

The Raus present two issues for our review, which we restate as:

- (1) Whether the trial court erred in granting HOML's Motion for Summary Judgment; and
- (2) Whether the trial court abused its discretion in denying the Raus' Motion to Correct Errors.

FACTS AND PROCEDURAL HISTORY

In 1994, Michelle and Edward Rau and Lynn and Robert Rau purchased neighboring homes in the Mallards Landing development in Valparaiso, Indiana. Thereafter, Peter and Sophie Rappo¹ (collectively, the Rappos) bought a neighboring lot and commenced construction of a home. After water began accumulating on the Rappos' property, they complained to the developers. A ditch was dug, solving the water accumulation problem on the Rappos' property. However, in 2000, for reasons irrelevant to this opinion, the Rappos had fill dirt dumped into the ditch, allegedly causing flooding on the Raus' properties.

¹ In their briefs, the parties use "Rapo". However, because the chronological case summary, the Complaint, and the trial court's orders use "Rappo", we do the same.

The “Declaration of Covenants and Restrictions For Mallards Landing” contains a provision allowing the developer, HOML, or any owner to sue to compel compliance with the covenants and restrictions. (Appellants’ App. pp. 125, 163). The provision states that “the expense of such litigation shall be borne by the then Owner or Owners of the subject property, provided such proceeding results in a finding that such Owner was in violation of said covenants and restrictions.” (Appellants’ App. p. 163). In suits brought by the developer and/or HOML, such expenses include “reasonable attorneys’ fees incurred . . . in seeking such enforcement.” (Appellants’ App. p. 163). However, in suits brought by an owner, “attorney fees specifically shall not be allowed . . . unless granted by a Court and based upon an independent finding of entitlement to such damages.” (Appellants’ App. p. 163).

HOML did not sue the Rappos based upon the dumping of the fill dirt or the alleged flooding of the Raus’ properties. However, on May 12, 2001, the Raus filed a Complaint against several parties, including HOML.² The Raus alleged that HOML had a duty to take action against the Rappos to stop the flooding of the Raus’ properties. On December 2, 2005, HOML filed a motion for summary judgment. Several evidentiary disputes arose. On January 7, 2007, the trial court granted HOML’s motion for summary judgment. On February 8, 2007, the Raus filed a Motion to Correct Errors, claiming that the trial court’s rulings on several evidentiary issues were unclear and asking the trial court to clarify those

² In addition to HOML, the Raus also sued the Rappos; Peoples Bank and Trust, Trust 10098; the owners and beneficiaries of Trust 10098; and Mallards Landing, Inc. Though these defendants are not participating in this appeal, a party of record in the trial court is a party on appeal. *See* Ind. Appellate Rule 17(A).

rulings. The Raus indicated their intent to appeal the trial court's summary judgment decision in favor of HOML and asserted that "the Court of Appeals cannot review this court's ruling unless the Court of Appeals knows what evidence was before the trial court." (Appellants' App. p. 48). The trial court held a hearing on the motion but then entered an order summarily denying it.

The Raus now appeal.³

DISCUSSION AND DECISION

The Raus argue that the trial court erred in granting HOML's Motion for Summary Judgment. The Raus' only contention is as follows: "The trial court erred in granting HOML summary judgment, as the association has the exclusive right to recover attorneys' fees for successfully enforcing the restriction against placing fill dirt in an easement that blocks or impairs the drainage from adjoining lots in the subdivision." (Appellants' Br. p. 9). In its Appellee's Brief, HOML claims that the Raus have made this argument relating to the attorney fees provision for the first time on appeal. In their Reply Brief, the Raus do not

³ Before turning to our discussion, we must address two pending motions: the Raus' Motion to Strike Portions of Appellee's Appendix and HOML's Motion to Strike Appellants' Brief or Portions Thereof. In their Motion to Strike Portions of Appellee's Appendix, the Raus note that HOML has included the entire depositions of Michelle Rau and Bryan Cload in its appendix even though only a handful of pages from those depositions were designated to the trial court in support of HOML's Motion for Summary Judgment. The Raus characterize this as an "effort to surreptitiously supplement the record on appeal with a tacit request to read (and presumably rely upon) deposition testimony that the trial court was never asked to review[.]" The Raus underestimate our ability to separate the relevant from the irrelevant. If evidence was not designated to the trial court, then we will not consider it on appeal. As such, while we agree with the Raus that HOML's appendix is an incredible waste of paper and violative of Indiana Appellate Rule 50 governing the contents of appendices, we refuse to encourage the filing of such trivial motions (another waste of paper) by granting the one before us. A simple footnote in the Raus' Reply Brief would have just as effectively alerted us of the problem. We therefore deny the Raus' Motion to Strike Portions of Appellee's Appendix. We also deny HOML's Motion to Strike Appellants' Brief or Portions Thereof. From what we can tell, HOML filed this motion for no other reason than to retaliate for the Raus' motion.

deny this claim. An issue raised for the first time on appeal, even in the summary judgment context, is waived. *See McGill v. Ling*, 801 N.E.2d 678, 687 (Ind. Ct. App. 2004), *reh’g denied, trans. denied*.

The Raus would apparently have us postpone our resolution for the time being, urging that we must first remand the case to the trial court for clarification of the evidence it relied upon in reaching its decision. The Raus argued in their Motion to Correct Errors and argue again on appeal that the trial court has not yet resolved several challenges to the designated evidence and that we cannot review the trial court’s summary judgment decision “without a more specific definition of the evidence admitted[.]” (Appellants’ Br. p. 9). Though we see the logic of the Raus’ argument, we conclude that this issue is moot. Even if we were to send this case back to the trial court, and it were to resolve all evidentiary issues in favor of the Raus, the fact would remain, as discussed above, that the Raus have waived their challenge to the summary judgment decision by arguing grounds not raised to the trial court. No amount of clarification by the trial court would change that result.

CONCLUSION

Based on the foregoing, we conclude that, by raising an argument that was not presented to the trial court, the Raus have waived any challenge they may have had to the trial court’s grant of HOML’s motion for summary judgment.

Affirmed.

KIRSCH, J., and MAY, J., concur.